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IN THE SUPERIOR COURT OF STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA, **Plaintiff,** **v.** **STEVEN CARROLL DEMOCKER,** **Defendant.**	**Cause No. P1300CR20081339** **Division 6** **STATE'S CONSOLIDATED RESPONSE TO DEFENDANT'S MOTIONS TO PRECLUDE: 1) THE STATE'S COMPUTER FORENSIC EXPERTS AND REPORTS; AND 2) EVIDENCE OF LATE SORENSON LABORATORY FORENSIC TESTING**

The State of Arizona, by and through Sheila Sullivan Polk, Yavapai County Attorney, and her deputy undersigned, hereby submits its consolidated response to the motions listed in the caption. Defendant's argument in both the motions is essentially the same; therefore, a consolidated response is appropriate. The State's position is supported by the attached Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

Defendant asks this Court to preclude the State from offering its computer forensics experts and reports as well as any results from recent testing at Sorenson Laboratory. Defendant claims he is entitled to preclusion based upon the State's alleged violations of *Ariz. R. Crim. P.*, Rule 15.1.

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LAW:

Ariz. R. Crim. P., Rule 15.1 outlines the State's duties regarding discovery. Rule 15.1(b)(4) specifically addresses disclosure of physical examinations, scientific testing, experiments, and comparisons. In *State ex rel. Thomas v. Newell (Milagro),* 221 Ariz. 112, 210 P.3d 1283 (App. 2009), the Court of Appeals reviewed a trial court's order requiring the State to disclose, within a limited amount of time, results of scientific comparisons that had not yet been completed. The Court held that Rule 15.1:

> ... does not prohibit the trial court from setting additional deadlines in the interest of promoting judicial efficiency and managing its calendar. The court's inherent power to manage its cases is reflected in the language of Rule 15.1. The court has discretion to vary from those deadlines, as evidenced by the language "[u]nless otherwise ordered by the court" that begins subsections (a), (c), and (e). The trial court, therefore, has discretion to adjust disclosure deadlines pursuant to its inherent powers and the language of Rule 15.1.

State ex rel. Thomas v. Newell (Milagro), 221 Ariz. 112, 115, 210 P.3d 1283, 1286 (App. 2009) (citations omitted).

The Court added, however, that "[t]he same discretion does not extend to determining what must be disclosed pursuant to Rule 15.1(b)." *Id.* In its ruling, the Court stated that "[b]ecause the analysis had not been completed ... the State could not disclose it. The State had not violated the Rule 15 deadlines ... and was, therefore, not subject to sanction.[1]" *Id.* Additionally, even where ***"a sanction is warranted, it should have minimal effect on the evidence and the merits of the case. Precluding evidence is rarely the appropriate sanction."*** *State v. Towery,* 186 Ariz. 168, 186, 920 P.2d 290, 308 (1996). (emphasis added).

[1] The Court noted that it assumed, without deciding, that the results of completed scientific testing constituted new or different information as contemplated by Rule 15.6.

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Rule 15.6(a) provides that "each party shall make additional disclosure, seasonally, whenever new or different information ... is discovered." In the event any part expects disclosure to be "forthcoming within 30 days of trial," the court and other parties must be notified. Rule 15.6(b). Pursuant to Rule 15.6(c), the final deadline for disclosure is 7 days before trial. Neither of these deadlines has been reached.

I. Computer Forensic Experts and Reports.

The electronic media seized in this case, much like the disclosure to date, is vast. In addition to at least four hard drives, numerous other items such as flash drives, CDs, DVDs, iPods and digital cameras have been submitted for testing. The defense's allegation that examination did not begin on these devices until months after the evidence was seized is incorrect. Initial examinations were performed by YCSO detectives before the devices were sent to the DPS Computer Forensic Lab. As the Court is aware, the defense is correct in stating the examinations of all of the materials are not yet complete. The State is moving as expeditiously as possible to finish these examinations and will disclose all resulting reports as soon as practicably possible after they are received by the prosecutor's office.

To the so-called Encase case file, Sgt. Arthur testified that he did not use that term and that there was no record of every single hit obtained when key word searches were performed. Sgt. Arthur testified that often times there were hundreds of thousands of search hits and only those deemed relevant to the case were documented. Ms. Chapman thoroughly questioned Sgt. Arthur about the forensic procedures followed by the lab. The fact that his answers were not of the "text book" variety she anticipated does not lessen his expertise or credibility as the head of the forensic department, nor should it bring into question the quality of the testing performed at the lab.

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This Court has heard testimony related to the emails between Defendant and Carol shortly before her death. This evidence shows Defendant had pecuniary motive to end Carol's life. This Court also heard evidence that Defendant's computer contained information gathered from the internet on how to kill someone and make it look like an accident or suicide. This evidence has been disclosed in a timely manner, however, this evidence was relatively easy to identify and was literally just the tip of the iceberg as it was all that was seen at first glance.

The defense team's allegation that the State is purposefully interfering with their ability to conduct a review is fundamentally inaccurate. The simple fact is that these intensive computer searches take time. The mirror images of these computers have been in the possession of the defense while this research has been conducted. Furthermore, Defendant is the person that did the original research on this subject matter. It only seems reasonable that he would know where to look for his own research. As there has been no disclosure violation regarding results of testing that is not yet complete, Defendant's request for preclusion of this yet to be identified evidence should be denied.

II. Sorenson Laboratory

The defense team continually misrepresents this Court's Order dated May 12, 2009. On that date, this Court ordered the State to disclose everything within its possession on that date to the defense by June 22, 2009. The Court clarified its Order, citing *State ex rel. Thomas v. Newell (Milagro),* 221 Ariz. 112, 210 P.3d 1283 (App. 2009), affirming that the June 22 deadline "pertains to information in the State's possession, not to testing or analysis reports which have not yet been concluded and/or produced." (See Exhibit A, Minute Entry dated June 3, 2009.) The State complied with that Order with the exception of several items

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that required intense redaction. The State requested and received from the Court additional time to deliver that evidence.

As the State has reiterated on several occasions, the investigation of this case is on-going. Additional testing is necessary to ensure that every possible avenue has been explored in the State's attempt to resolve all unknowns. The State provided the list of material sent to Sorenson within two days of its delivery. The State received documents pertaining to what type of testing would be performed on February 25, 2010, however, these contained a mixture of documents from this case and an unrelated case. The State requested and has just received a full set of the correct documents. These may have already been delivered to the defense team by the filing of this response.

Moreover, defense team has yet to interview any witness from Sorenson. The addition of new results can easily be reviewed and compiled with those previously received. As there is no disclosure violation associated with testing that has yet to be completed, Defendant's request to preclude any pending results from Sorenson Laboratory should be denied.

CONCLUSION:

Defendant's unrelenting and overstated complaints regarding the State's alleged failure to comply with Rule 15 need to be taken in the proper context. The defense team has made it their mission to complain and cry foul each and every time an issue is not addressed to their satisfaction. They persistently point out delays and allege they are deliberate, regardless of the material's evidentiary value or actual significance. The State asks the Court to separate the overblown complaints from reality and to not be unduly swayed by what amounts to extremely exaggerated accusations regarding the State's disclosure habits in this case. Defendant's

Motion to preclude the DPS experts and reports as well as the testing or analysis reports which have not yet been concluded and/or produced from the DPS Lab or Sorenson Lab should be denied.

RESPECTFULLY SUBMITTED this 8th day of March, 2010.

Sheila Sullivan Polk
YAVAPAI COUNTY ATTORNEY

By: _____
Joseph C. Butner
Deputy County Attorney

COPIES of the foregoing delivered this 8th day of March, 2010 to:

Honorable Thomas J. Lindberg
Division 6
Yavapai County Superior Court
(via email)

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STATE'S EXHIBIT A

COURT ORDER Clarifying Minute Entry Order
Entered on May 12th, 2009.

w/o

SUPERIOR COURT, STATE OF ARIZONA, IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA **(Plaintiff)** **vs.** **STEVEN CARROLL DEMOCKER** **(Defendant)**	**Case No. CR 2008-1339** **COURT ORDER clarifying: Minute Entry Order Entered on May 12th, 2009**	**FILED** **DATE:** JUN 03 2009 1 **O'Clock** P **M.** **JEANNE HICKS, CLERK** **BY:** S. Shumake **Deputy**

HONORABLE Thomas B. Lindberg	**BY:**	**Martha Wolfinger / Judicial Assistant Division Six**
DIVISION SIX	**DATE:**	**June 3rd, 2009**

The Court by this Order clarifies the Minute Entry entered May 12, 2009. Therein, conflicting disclosure deadlines apparently were set for the State. On page one, the disclosure deadline was "60 days from (May 12, 2009)." On page two, the minute entry says the State is to produce what it has in its possession no later than June 22, 2009.

In keeping with the recent decision of *State v Newell (Milagro)*, --- Ariz. ---, --- P.2d --- (1 CA-SA 09-0052, Court of Appeals filed June 2, 2009), the Court clarifies that the disclosure deadline of discoverable information in its possession is June 22, 2009. The State has a continuing obligation to make disclosure in a timely fashion subject to possible sanctions under Rule 15. But, as *Newell* makes clear, the deadline set pertains to information in the State's possession, not to testing or analysis reports which have not yet been concluded and/or produced.

DATED this 3rd day of June, 2009.

The Honorable Thomas B. Lindberg
Yavapai Superior Court / Division Six

cc: Joseph C. Butner III, Esq., Office of the Yavapai County Attorney **(via e-mail this date)**
(e) John M. Sears, Esq., 107 North Cortez Street, Suite 104, Prescott, Arizona 86301 **(via e-mail and facsimile this date to 928-445-1472)**
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Victim Services: **Attn. Marie Martinez**

JUN 03 2009